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September 19, 2016

**ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: *Ex Parte*, MB Docket No. 16-42, CS Docket No. 97-80**

Dear Ms. Dortch:

This is to inform you that on September 14, 2016, Matthew Zinn, Chief IP & Government Affairs Officer, TiVo Inc. ("TiVo") and the undersigned (collectively, the "TiVo Representatives") met with the following Commission staff in connection with the above-captioned proceeding to promote competition in the market for consumers' video navigation devices: (1) Marc Paul, Legal Advisor to Commissioner Rosenworcel; (2) David Grossman, Chief of Staff to Commissioner Clyburn; (3) Commissioner Michael O'Rielly and Chief of Staff Robin Colwell; (4) Paul de Sa, Chief of the Office of Strategic Planning and Policy Analysis; and (5) Chief Technologist Scott Jordan; Gigi Sohn, Jessica Almond, and Eric Feigenbaum of Chairman Wheeler's Office; Howard Symons, John Williams, Marilyn Sonn, and Susan Aaron of the Office of General Counsel; and Lyle Elder of the Media Bureau.

The TiVo Representatives explained that, based on their understanding of Chairman Wheeler's proposal to increase consumer choice and innovation in the video marketplace, as outlined in the Fact Sheet, the proposal represents a vital opportunity to unleash robust competition in the market for video navigation devices some two decades after Section 629 was enacted into law. The TiVo Representatives noted that the proposal represents a significant departure from the approach outlined in the NPRM, which TiVo and others supported as making consumer interests paramount.

Indeed, Chairman Wheeler's proposal largely adopts the MVPD app proposal, which gives MVPDs flexibility to develop their own apps (as opposed to a single security solution applicable to all MVPDs) and which was supported by the content industry. Thus Chairman Wheeler's proposal embraces the MVPD and programmers' preferred approach for addressing concerns that have been central to this proceeding: preserving channel line-ups and presentation of programming, ensuring that advertising is not replaced or obscured, preserving arrangements favoring minority programming, and ensuring consumer privacy is protected. However, by preserving the ability of competitive device makers to innovate in how programming choices are presented and searched for by consumers, the proposal promises to further the goals of Section 629 of giving consumers greater choice, enabling innovation in video devices, and saving consumers many billions of dollars a year in set-top box leasing fees. Accordingly, the TiVo Representatives urged the Commission not to delay and to push forward with its efforts to foster competition and consumer choice.

### Arguments Alleging "Compulsory Copyright Licensing" Are Misguided

Despite the fact that Chairman Wheeler's proposal accommodates nearly all of their demands, some established content industry interests have raised misguided claims that Commission oversight necessary to ensure a competitive video device market amounts to "compulsory copyright licensing." These claims are incorrect and appear to be deliberately designed to mask what is at stake in this proceeding and the fundamental consumer-benefit purpose of Chairman Wheeler's proposal. The proposal makes clear that, as is the case today, the terms of MVPD carriage are negotiated between programmers and MVPDs in the marketplace. The MVPDs obtain necessary performance, reproduction, and distribution rights directly from the programmers. That is a marketplace transaction between rights-holders and MVPDs, and as such the negotiations and the license agreement that results from it remain outside the purview of rules adopted in this proceeding.<sup>1</sup>

Chairman Wheeler's proposal also contemplates a standard license between MVPDs and device makers that merely governs how third party devices can receive and display the MVPD-controlled app for which the MVPD has already negotiated copyright authorizations. This agreement has nothing to do with copyright at all, let alone amount to a "compulsory license." No additional copyright authorization is needed for a subscriber device to display authorized programming. The Copyright Act delineates the exclusive rights of copyright holders, and there is no exclusive right to a private performance on a privately-owned device — which is why television sets,

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<sup>1</sup> See John Bergmayer, *How Chairman Wheeler's Video-App Plan Promotes Competition and Protects Private Rights*, Sep. 15, 2016, at <https://www.publicknowledge.org/news-blog/blogs/how-chairmans-wheelers-video-app-plan-promotes-competition-and-protects-private-rights>.

radios, computers, mobile devices, etc. do not require copyright licenses to display copyrighted content.

Indeed, the proposed standard license is similar to the DFAST license under the existing CableCARD solution, which is not a copyright license at all. Today, a subscriber who pays seemingly ever-increasing subscription fees for MVPD programming can watch programming using a CableCARD-enabled competitive set-top box from TiVo or Hauppauge that operates under the standard DFAST license – without the CE manufacturers requiring a copyright license. Moreover, the proposal’s standard license would be negotiated by representatives from MVPDs and programmers and, as is the case with the DFAST license today, presumably both programmers and MVPDs are third-party beneficiaries of the standard license providing a direct contractual enforcement mechanism.

The TiVo Representatives emphasized that the standard license between the MVPD and the competitive device maker that uses the MVPD-controlled app is merely subject to FCC oversight in the event programmers and MVPDs engage in anticompetitive or anti-consumer conduct by requiring the MVPD-supplied app to function in a way that harms consumers by discriminating against competitive devices. Otherwise, MVPDs and their program suppliers would have a free hand to reach agreements that would disadvantage consumers and stifle competition in both program content and navigation devices.

As the Consumer Video Choice Coalition (“CVCC”) has explained, the standard license negotiated by MVPDs and programmers cannot include terms that, for example, unfairly discriminate against certain classes of devices, require integrated search results to favor MVPD-supplied content, or otherwise limit competitive devices with respect to their functionality that is unrelated to the MVPD app.<sup>2</sup> Under Section 629, the Commission must retain oversight to ensure a competitive market for navigation devices, and any FCC actions designed to ensure that competitive devices are not discriminated against must trump private agreements between MVPDs and programmers.<sup>3</sup> Obviously, there cannot be true competition if the rules of the road are determined entirely by the two dominant players in the market – MVPDs and programmers – without any FCC oversight. Indeed, unless MVPDs and programmers

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<sup>2</sup> Letter from John A. Howes, Jr., Computer & Communications Industry Association, to Marlene H. Dortch, FCC, MB Docket No. 16-42, at 1-2 (filed Sep. 7, 2016).

<sup>3</sup> See John Bergmayer, Public Knowledge, *Private Interests Don’t Override the Law – In Music Publishing, Cable Boxes, or Anywhere Else*, Aug. 5, 2016, at <https://www.publicknowledge.org/news-blog/blogs/private-interests-dont-override-the-law-in-music-publishing-cable-boxes-or-anywhere-else>; Annemarie Bridy, *Unlock the Box Meets Lochner*, Aug. 4, 2016, at <https://cyberlaw.stanford.edu/blog/2016/08/unlock-box-meets-lochner>.

are intending to engage in anticompetitive conduct, there is no reason for concern about FCC oversight necessary to fulfill its statutory mandate.

### CableCARD Must Be Retained as a Backstop

The TiVo Representatives emphasized their support for a requirement that cable operators continue to supply and support CableCARD for seven years, as explained in TiVo's recent ex parte filing.<sup>4</sup> Continued supply of CableCARDs will ensure that consumers do not lose features and functionality that they enjoy today, and will give manufacturers a more certain path to invest in new competitive devices that can access MVPD programming between now and whenever the new app-based solution enables a truly competitive market for video navigation devices. TiVo has previously explained why the CableCARD support rules remain important to ensure that MVPDs do not discriminate against consumers who choose to use competitive options to replace their cable-provided set-top box.<sup>5</sup> The TiVo Representatives noted that the cable industry has already pledged to supply new CableCARDs and support installed CableCARDs, so such a requirement could not be considered burdensome.<sup>6</sup>

### Information Required for Innovations in UI and Universal Search

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<sup>4</sup> Letter from Matthew P. Zinn, TiVo Inc., to Marlene H. Dortch, FCC, MB Docket No. 16-42, at 1-2 (filed Sep. 6, 2016).

<sup>5</sup> Comments of TiVo Inc., MB Docket No. 16-42, at 32 ("Unfortunately, operator support for retail devices has not improved and has in fact gotten worse in recent years — for example, a recent TiVo survey of cable operator support for CableCARD-enabled retail devices indicated that only 5-13% of customer service representatives offered discounts to subscribers who brought their own device."); *id.* at 34-38; Reply Comments of TiVo Inc., MB Docket No. 14-16, at 4-6 (filed Apr. 21, 2014) (citing survey data and other examples of poor support for retail CableCARD devices); *Ex Parte* Letter filed by TiVo Inc., CS Docket No. 97-80 et al., at 2-4 (Mar. 27, 2014) (same); Comments of TiVo Inc., MB Docket No. 14-16, at 15-17 (filed Mar. 21, 2014) (same); Reply Comments of TiVo Inc., CS Docket No. 97-80, at 11-12 (filed Oct. 25, 2013) (same).

<sup>6</sup> Letter from James Assey, Executive Vice President, National Cable & Telecommunications Association to the Honorable Greg Walden, Chairman, and the Honorable Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology, September 18, 2013 ("repealing the integration ban will not affect the separate requirement for cable operators to make CableCARDs available to cable customers who buy a retail set top box from TiVo or others... Even if the integration ban is repealed, third party set-top box makers will still be able to sell boxes to *any* cable customer wishing to purchase a box at retail."); Testimony of Michael Powell, Chairman, National Cable & Telecommunications Association, Reauthorization of the Satellite Television Extension and Localism Act, House of Representatives, Committee on Energy and Commerce, Subcommittee on Communications and Technology, March 12, 2014 ("it is important to remember that, even if Congress passed this provision eliminating the integration ban, we would have [the] absolute legal obligation to continue to provide separate security and cable cards. Unless you believe we just completely flaunt the law, with no consequences at the Commission, that will continue to be the case.").

TiVo Representatives stressed that to enable competition, any FCC approach must provide competitive devices with sufficient information to enable a full-featured electronic program guide and integrated, universal search and personalization. TiVo Representatives discussed the importance of subscriber viewing information for personalization and providing recommendations, and stressed that competitive devices should be permitted to create their own data for improving the user experience.

While it is true that TiVo licenses guide data from third parties today and would expect to continue to do so, to provide true, fully functional integrated search capability, a competitive device requires:

- a way to import the list of available programs with a minimum set of data -- specifically, channel information (if any), program title, rating/parental control information, program start and stop times (or program length, for on-demand programming), and *an ID to uniquely identify a specific episode of a program*). The third party device can then license additional program information and use the ID to match across services.
- an API either in the MVPD app or directly to the MVPD cloud to make search requests or to retrieve a list of assets;
- entitlement and price information for both linear programming, VOD, and cloud recordings (if offered by the MVPD);
- information on how to display (or “tune” to) a program currently in progress without additional landing pages or authentication (once the app is initially authenticated, of course); and
- in order to provide personalized and predictive search and recommendations, information regarding search requests and past viewership.

### Recording and Parity

The TiVo Representatives stressed the importance of rules that require parity of features and performance between MVPD-supplied devices and apps and those provided by third parties. The TiVo Representatives stressed that such parity must extend to recording programming that the subscriber has paid for. For competitive parity, if the MVPD STB enables recording, either local or cloud, then the MVPD App must allow user-initiated recording through the competitive UI (using cloud if the MVPD has it). Parity must extend to simultaneous recording, so that if the MVPD STB can record 6 streams, then the app should be able to record 6 streams. Moreover, the TiVo Representatives stressed that it is vital for the competitive guide to be able to request a recording from the cloud DVR irrespective of the device that requested the recording to be made. The API requirements need to include the ability to cause a program to be recorded if DVR is included. This need be no more complicated than a playback mechanism where the competitive app is able to send a command to the

MVPD app to start/stop recording. Querying for capabilities on simultaneous recordings, and querying active recordings would be needed to round out that functionality when multiple apps may be interacting with the MVPD app.

In addition, the TiVo Representatives urged the FCC to allow MVPDs, if they so choose, to support a protocol similar to the NPRM's original "three flows" approach rather than develop apps for various platforms. Rules should provide flexibility so that if an MVPD were to decide to support a protocol consistent with the NPRM, such as the solution that was in the CVCC Technical Appendix,<sup>7</sup> such an approach would be compliant.

Finally, the TiVo Representatives reiterated their support for an exemption for small operators.<sup>8</sup>

\* \* \*

Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,

A handwritten signature in black ink that reads "T. Devendra Kumar". The signature is written in a cursive style with a long horizontal stroke at the end.

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<sup>7</sup> Comments of the Consumer Video Choice Coalition, MB Docket No. 16-42, Technical Appendix (filed Apr. 22, 2016).

<sup>8</sup> Letter from Matthew P. Zinn, TiVo Inc., to Marlene H. Dortch, FCC, MB Docket No. 16-42, at 2 (filed Sep. 6, 2016).

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